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Jacksonian Jurisprudence and the Obscurity of Justice John Catron

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In 1899, George H. Williams, who once had been President Ulysses Grant's Attorney General, reminisced about his appearances before the Supreme Court.[1] Although he was not admitted to practice before the Court until 1865, he observed some of its sessions in the mid-1850s.[2] Chief Justice Roger B. Taney, who he never saw after this period, left quite an impression on the young lawyer.[3] Some of Taney's colleagues, however, like Justices Peter V. Daniel and John Catron, did not stand out in Williams's memory. Indeed, Williams's remarks concerning Catron proved quite brief: "I . . . have no very distinct impressions as to Catron."[4]

A century has passed since Williams published that remark, but the line adequately reflects the contemporary understanding of Justice Catron, who remains an obscure figure in the Court's history. Unlike many of his colleagues—Roger Taney,[5] Joseph Story,[6] Peter V.

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1. George H. Williams, *Reminiscences of the United States Supreme Court*, 8 YALE L.J. 296, 296–305 (1899).

2. *Id.* at 296.

3. *See id.* (noting that the Chief Justice's appearance was "still daguerreotyped upon [his] memory").

4. *Id.*

5. *E.g.*, CHARLES W. SMITH, ROGER B. TANEY, JACKSONIAN JURIST (1935); CARL BRENT SWISHER, ROGER B. TANEY (1935).

Daniel,[7] John Campbell,[8] John McLean,[9] and even James M. Wayne[10]—Catron never has been the subject of a book-length biography.[11] But scholars have not ignored him completely, either. Timothy Huebner, in his study of the Southern Judicial Tradition, devoted a chapter to Catron's tenure on the Tennessee Supreme Court,[12] and book-length histories of the Taney Court give Catron an obligatory biographical snippet.[13] Catron also plays a bit role in various studies of the *Dred Scott* case for which he is remembered both as the Justice who wrote to President-Elect James Buchanan, asking him to sway the vote of Justice Robert C. Grier,[14] and as the author of a rather quirky concurring opinion that rejected many of Chief Justice Taney's arguments.[15] Beyond those instances, as Williams noted more than one hundred years ago, Catron did not leave many distinct impressions.[16]

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6. *E.g.*, GERALD T. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT (1970); JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION (1971); R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1986).

7. *E.g.*, JOHN P. FRANK, JUSTICE DANIEL DISSENTING: A BIOGRAPHY OF PETER V. DANIEL, 1784–1860 (1964).

8. *E.g.*, ROBERT SAUNDERS, JR., JOHN ARCHIBALD CAMPBELL, SOUTHERN MODERATE, 1811–1889 (1997).

9. *E.g.*, FRANCIS P. WEISENBURGER, THE LIFE OF JOHN MCLEAN: A POLITICIAN ON THE UNITED STATES SUPREME COURT (1937).

10. *E.g.*, ALEXANDER A. LAWRENCE, JAMES MOORE WAYNE: SOUTHERN UNIONIST (1943).

11. Unlike many of his Taney Court colleagues, Catron left behind no collection of papers suitable to serve as a basis for a full-length biography.

12. TIMOTHY S. HUEBNER, THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790–1890, at 40–69 (1999) [hereinafter HUEBNER, SOUTHERN JUDICIAL TRADITION]; *see also* Theodore Brown, Jr., *The Formative Period in the History of the Supreme Court of Tennessee, 1796–1835*, *in* A HISTORY OF THE TENNESSEE SUPREME COURT 1, 1–60 (James W. Ely, Jr. ed., 2002).

13. *See* TIMOTHY S. HUEBNER, THE TANEY COURT: JUSTICES, RULINGS, AND LEGACY 66–72 (2003) [hereinafter HUEBNER, TANEY COURT] (providing the best brief introduction to the Taney Court).

14. *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 311–12 (1978) (discussing Catron's effort to get Buchanan to help him entice a northerner into the *Dred Scott* majority); Drew E. Edwards, *Judicial Misconduct and Politics in the Federal System: A Proposal for Revising the Judicial Councils Act*, 75 CAL. L. REV. 1071, 1073–74 (1987) (discussing the correspondence between President-Elect Buchanan and Justices Catron and Grier).

15. *See* AUSTIN ALLEN, ORIGINS OF THE DRED SCOTT CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT, 1837–1857, at 195–96 (2006) (discussing Justice Catron's arguments and other Justices' responses thereto); Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305, 345 (1988) (discussing Catron's use of the Comity Clause in his proslavery argument); Robert R. Russel, *Constitutional Doctrines with Regard to Slavery in the Territories*, 32 J. S. HIST. 466, 478 (1966) (describing Catron's argument for slavery based on the fundamental condition of the equality of the states and noting its similarity to the Calhoun doctrine).

16. *See supra* note 4 and accompanying text.

Two factors, aside from a lack of collected papers, explain the relative scholarly neglect of Justice Catron. First, Catron tended to specialize in common law cases, particularly property disputes. He had served as a judge on the Tennessee Supreme Court from 1824 until 1835 and had developed a considerable background in adjudicating such cases. Second, Catron often spoke for the Court in cases that involved complex technical matters, which rarely attracted public interest. When the Court heard the notorious inheritance case involving Myra Clark Gaines—the longest American legal dispute of the nineteenth century, one charged with sexual scandal that the press found enticing—Catron wrote one of the opinions.[17] These sorts of disputes, however, do not attract the same amount of scholarly attention as do constitutional cases, and Catron wrote relatively few opinions on such matters. Even in cases concerning slavery, an issue that deeply engaged the Taney Court, Catron often remained silent,[18] and that stance contributed to his obscurity. But Catron did vote in such cases, and he generally sided with the majority.

This pattern of voting accounts for the second factor leading to the neglect of Justice Catron. During his tenure on the Supreme Court (1837-1865), Catron shared with a majority of his colleagues a set of assumptions that I label "Jacksonian jurisprudence." These assumptions manifested themselves in public law decisions as an effort to enforce an amoral vision of collective self-rule that gave state legislatures great latitude in determining their own policy. In private law decisions, however, they appeared as an attempt to inculcate among citizens an individuated self-rule by imposing a market-oriented morality on the litigants who appeared before the Court.[19] Through this framework, the Justices worked to reconcile the Taney Court's conflicting commitments to national and state sovereignty, to the protection of slavery, and to the promotion of economic development. Catron's opinions on both the Supreme Court of Tennessee and the U.S. Supreme Court underscore a wholehearted embrace of these assumptions. Because he shared these beliefs with his colleagues, however, Justice Catron often voted silently in cases

17. Gaines v. Relf, 53 U.S. (12 How.) 472, 505 (1852); *see also* ELIZABETH URBAN ALEXANDER, NOTORIOUS WOMAN: THE CELEBRATED CASE OF MYRA CLARK GAINES 210 (2001) (discussing Justice Catron's opinion in this case and how it reflected his Southern biases).

18. *See* William M. Wiecek, *Slavery and Abolition before the United States Supreme Court, 1820–1860*, 65 J. AM. HIST. 34, 45, 51 n.63 (1978) (noting Catron's silence in two of the Court's major slavery decisions, although one was due to illness).

19. *See* ALLEN, *supra* note 15, at 10–12 (discussing the Taney Court's reluctance to interfere with matters it considered legislative and its insistence that individuals act as sovereigns in conducting their daily affairs).

expressing them, and consequently, he never distinguished himself as a major figure on the Court. Nonetheless, his presence helped fill in the majority that shaped the Court's direction under Chief Justice Taney.

This Article argues that Justice Catron's acceptance of the general premises of the Court's Jacksonian jurisprudence accounts for his obscurity. Part One demonstrates that Catron articulated a similar framework while serving on the Tennessee Supreme Court. Part Two illustrates his continued support for that framework after he moved to the U.S. Supreme Court. Part Three, however, demonstrates that, although he embraced much of the Taney Court's jurisprudence, Catron did not move in lockstep with his colleagues. Indeed, the elements he emphasized within that framework—namely, support for state sovereignty and equality as well as an aversion to judicial policymaking—led him to break briefly with his colleagues' thinking in the mid-1850s. Even then, Catron failed to stand out as a prominent Justice.

I. JACKSONIAN JURISPRUDENCE ON THE TENNESSEE SUPREME COURT

Although he came from a relatively modest background—at least when compared to other Supreme Court Justices[20]—Catron became a prominent figure in Tennessee politics in the 1820s and 1830s. He served in the U.S. Army under the command of Andrew Jackson during the 1810s and then turned his attention to the practice of law and the pursuit of political office.[21] By the 1820s, he had married into a prominent Democratic family, moved into General Jackson's neighborhood, and secured a position on the state supreme court.[22] In the 1830s, Catron supported Jackson in the major struggles of his presidential administration. He distinguished himself as a strong opponent of nullification within the state, offering advice to Jackson and advocating the use of force to stop South Carolina's possible secession.[23] He also repudiated, in *State v. Foreman*,[24] the

20. *See* John R. Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait*, 3 MIDWEST J. POL. SCI. 1, 2 (1959) (citing Fred Rodell, who attributed all of Chief Justice Taney's decisions to his big-plantation birth and background).

21. HUEBNER, SOUTHERN JUDICIAL TRADITION at 41–43.

22. *Id.* at 43–44; Burton W. Folsom II, *The Politics of Elites: Prominence and Party in Davidson County, Tennessee, 1835–1861*, 39 J. S. HIST. 359, 361 (1973).

23. Paul H. Bergeron, *Tennessee's Response to the Nullification Crisis*, 39 J. S. HIST. 23, 33 (1973).

24. 16 Tenn. 256, 272–74 (1835).

Marshall Court's ruling in *Worcester v. Georgia*[25] that states could not extend their laws over Indian territories within their boundaries. While proving to be a loyal follower of Jackson with such actions, Catron also articulated during his years on Tennessee's high court a jurisprudential vision in both public and private law that ultimately would mesh well with that of his colleagues on the U.S. Supreme Court.

Catron's 1835 ruling in *Foreman* provides the best starting point from which to examine the public law dimensions of this vision.[26] In 1833, Tennessee's legislature passed a law extending its jurisdiction into the portion of the Cherokee Nation that lay within its boundaries. Although he had upheld Indian treaty rights in the past,[27] Catron defended the state's action as incident to its sovereignty. Tennessee's jurisdiction over Cherokee territory, Catron argued, rested on the law of conquest, which constituted part of international law when European powers colonized the Americas. "By this rule, the Indians found on this continent, the Cherokees inclusive, were allowed no political rights, save at the discretion of the European power that colonized the country."[28] The rights of conquest then passed from the colonial government of England to the State of North Carolina after the Revolution, to the territorial government established under the Southwest Ordinance, and finally to the State of Tennessee, which could exercise those rights at its discretion. No treaty with the Cherokee, moreover, could extinguish those rights, for the federal government possessed neither the right to establish a government

25. 31 U.S. (6 Pet.) 515 (1832).

26. My interest in *Foreman* centers on the doctrinal arguments that Catron deployed in the course of his opinion. I am aware that students of the Tennessee Supreme Court find *Foreman* to be a sort of legal about-face for Catron. *See* TIM ALAN GARRISON, THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS 198–233 (2002) (providing an extensive account of the decision); HUEBNER, SOUTHERN JUDICIAL TRADITION at 59–60 (acknowledging the decision's inconsistencies with prior decisions and suggesting possible explanations therefore); Brown, *supra* note 12, at 57–60 (quoting one commentator who concluded that Catron's opinion "seem[ed] less one of law than of the rationalization of power"). Although there is no question that Catron had previously upheld Cherokee property rights, *see* McIntosh v. Cleveland, 15 Tenn. 46, 52 (1834) (Catron, J., concurring) (concurring with the majority's holding that driving Indians from their lands did not constitute a voluntary removal); Jones' Lessee v. Evans, 13 Tenn. 323, 328 (1833) (Catron, J., dissenting on other grounds) (same), I am not convinced that *Foreman* constituted as sharp a break as these scholars imply. Cases like *McIntosh* and *Jones' Lessee* involved Cherokee who had decided to live as citizens of Tennessee on land located outside of the Cherokee Nation. Decisions upholding those claims seem to embrace a completely different set of concerns than those involved in *Foreman*, and they seem, to my mind, reconcilable. I will not undertake that project here.

27. *See supra* note 26.

28. *Foreman*, 16 Tenn. at 335.

inside a state nor the authority to regulate a state's internal policy. Under the Constitution, the federal government could regulate commerce with the Cherokee and nothing else. Matters of criminal jurisdiction—such as the murder conviction at issue in *Foreman*—lay with the state.[29]

Two elements of this argument deserve notice. First, Catron's position maximized the discretionary authority of state legislatures. Although he observed that both federal powers to create treaties[30] and to regulate commerce with Native Americans[31] came into play, Catron employed the rhetoric of state sovereignty to dismiss those considerations. The authority to negotiate treaties, he argued, conferred no power for Congress to legislate where it ordinarily could not. A treaty, therefore, could not empower Congress to pass legislation extending to criminal cases occurring on Cherokee land in Tennessee.[32] The power to regulate commerce also conferred no such authority; it embraced "the government of navigation and intercourse"[33] and extended beyond the mere "traffic, . . . buying and selling, or the interchange of commodities."[34] It had to, because "[u]nder a different construction, one [s]tate might load another with imposts and taxes on the passage of goods and persons, ruinous to the interior."[35] This power did not extend to a general authority over criminal offenses. Tennessee held that authority. The state had long declined to exercise that power, but it did so now:

> The Cherokees are overrun by the whites, their government is broken up and suppressed by Georgia, their few people within our limits are so scattered and feeble, as not only to be incapable of self-government, but they are wholly incapable of protecting themselves, or the whites among them, against individual depredation upon persons or property. Their's [sic] is, emphatically, a land without law, if our laws do not reach it . . . .[36]

This interpretation of the Constitution effectively created a void that only an assertive sovereign state could fill.

Catron's vision of governmental power, at least in public law cases, proved to be fundamentally amoral. In a letter defending his opinion against the criticism of his future U.S. Supreme Court

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29. *Id.* at 335–36.

30. *Id.* at 312–13.

31. *Id.* at 315–16.

32. *Id.* at 315 (arguing that neither Congress nor the treaty power could take away jurisdiction because it belonged to the states).

33. *Id.* at 316.

34. *Id.*

35. *Id.*

36. *Id.* at 319.

colleague Justice John McLean, Catron explained that a judge ought not to view the law as "a system of ethical philosophy."[37] Rather, one should approach it as set of rules "to maintain the ancient state of things regardless of the sanctions giving rise to it."[38] He made a similar point in *Foreman*. Catron considered the doctrine of conquest upon which he drew to be "in conflict with our religion, and with our best convictions of a refined and sound morality."[39] Yet he felt compelled to invoke it: "[O]ur individual titles to lands, from the Atlantic to the western Missouri line, depend upon its firm and unquailing support, regardless of its origin. . . . Time and necessity have lent it their sanction; it is the law of the land."[40] Catron's stance exposed a desire not to second-guess legislatures on the grounds of substantive policy. As he stated in another case, his court had no authority "to enquire for the motive operating on the Legislature."[41] The Justices' business was to determine only whether a law was constitutional and, therefore, binding. If a statute conflicts "with the laws of the United States, [we] reject it as void; if not, we must enforce it."[42] Indeed, he even at times struck down laws with which he agreed personally.[43]

Catron's amoral stance, like that of the Taney Court on which he would later serve, extended only to cases of public law. His opinions in private law cases often could be charged with moral sensibility as he demanded that individuals govern themselves as sovereigns and accept full responsibility for their actions.[44] When a taxpayer sued his local sheriff to recover money he had overpaid (because he calculated his bill on the basis of a tax law that previously had been declared unconstitutional by the state supreme court), Catron wrote an opinion explaining why the litigant could not recover.[45] His "payment . . . was

37. ALLEN, *supra* note 15, at 18.

38. *Id.*

39. *Foreman*, 16 Tenn. at 333.

40. *Id.*

41. Pettyjohn v. Akers, 14 Tenn. 448, 451 (1834).

42. *Id.*

43. *E.g.*, Marr v. Enloe, 9 Tenn. 452, 458 (1830). In this case, Catron struck down as unconstitutional an 1827 Tennessee law permitting county courts to assess taxes in their own county. That policy ran contrary to a constitutional provision that every 100 acres in the state be taxed at the same rate as every other. Catron believed the provision to be absurd but argued that the people would have to alter the Tennessee Constitution and the legislature could not do so through an ordinary act of legislation. *Id.*

44. *See* ALLEN, *supra* note 15, at 37–44 (discussing several cases in which the Taney Court Justices forced the litigants to "adhere to the letter of their obligations to prevent disorder," even if the results seemed harsh).

45. Dickins v. Jones, 14 Tenn. 483, 483 (1834).

voluntary," and he knew of the law's unconstitutionality when he paid his bill.[46] The majority believed "that money paid under a knowledge of all the facts cannot be recovered on the ground that the plaintiff mistook the law."[47]

Most of these rulings demanded that litigants stand by the obligations they incurred in the market. Thus, when Scruggs agreed to pay Gass for a load of bacon with notes drawn on a particular bank (which neither party knew had failed), the court ruled that Gass must accept the worthless paper as payment.[48] "To adopt a different rule," Catron wrote, "would end in much litigation and confusion."[49] Likewise, a lawyer who had worked on a case that he had been hired to litigate could demand payment even if the dispute were settled without litigation.[50] The client, Catron wrote, "was bound in law and morals to pay . . . because the counsel had faithfully performed his part of the contract."[51] Only in extremely clear cases of fraud did Catron depart from this stance. He once set aside a contract for the sale of a plantation that sold for about half of its appraised value.[52] Catron's initial inclination was to let the agreement stand, but the seller was grotesquely drunk at the time of the bargain and apparently remained so constantly until his death a few months later.[53] The purchaser had exploited the situation unfairly to the detriment of the seller's family.[54]

In most cases, however, intoxication provided no excuse because the court tended to place a high standard of self-control on the litigants who came before it. In 1827, for example, Catron joined a rather preachy opinion[55] (so much so that the author apologized for its moralistic tone[56]) that insisted a drunk person take responsibility for

46. *Id.* at 484.

47. *Id.*

48. Scruggs v. Gass, 16 Tenn. 175, 177 (1835).

49. *Id.*

50. McClain v. Williams, 16 Tenn. 230, 232 (1835) (holding that the client who had hired an attorney to represent him in an ejectment action was bound to pay him for his services, even though the client settled the matter on his own).

51. *Id.*

52. Hotchkiss v. Fortson, 15 Tenn. 66, 71 (1834).

53. *Id.* at 73.

54. *Id.* (noting that the "mind shrinks from an injustice so gross").

55. Cornwell v. State, 8 Tenn. 147 (1827).

56. *Id.* at 159:

> Parts of this opinion may appear to partake of the character of a moral lecture. It is believed to be called for by the occasion. We have seen before us this day, three fellow beings who are about to be ushered into the presence of their maker, two of whom may probably attribute his unnatural exit from this world, to the immoderate use of ardent spirits.

all actions taken while inebriated. The court was expressing its frustration at having to reject, for the second time in a single term, a plea of alcohol-induced insanity as a defense against a murder conviction.[57] Catron's most forceful expression of the importance of self-control came in 1829 when he explained why lawyers would be disbarred for dueling.[58] "We are told this is only a kind of *honorable* homicide," Catron wrote.[59] "The law knows it as a wicked and wilful [sic] murder. . . . [W]e are placed here firmly and fearlessly to execute the laws of the land—not visionary codes of honor, framed to subserve the purposes of destruction."[60] That destruction came about because the practice of dueling allowed weak men to be governed by "blind and reckless passion"[61] or by "the giddy assertions . . . of the community."[62] What Catron demanded was a state bar composed of men possessing "moral courage[] and fearless firmness" who could respond to perceived insults with calmness and through negotiation.[63]

Catron's tenure on the Tennessee Supreme Court ended in 1836. That year he supported Martin Van Buren for President. Tennessee by that time had become a seat of Whig opposition and the home of Hugh Lawson White, one of the three Whig candidates who ran against Jackson's hand-picked successor. White's allies took revenge on Catron by forcing him off the court.[64] By that point, however, Catron had articulated fully a jurisprudential vision that both affirmed the people's authority to rule themselves through the legislatures and forced individuals to govern themselves by meeting the obligations they incurred in the market. Catron's removal from the bench also freed him to campaign vigorously for his candidate, and on his last day as President, Jackson rewarded him for his efforts by elevating Catron to the U.S. Supreme Court.[65]

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57. *Id.* at 155.

58. Smith v. State, 9 Tenn. 228 (1829).

59. *Id.* at 237 (emphasis in original).

60. *Id.*

61. *Id.* at 233.

62. *Id.* at 234.

63. *Id.* at 236. *But see* ALLEN, *supra* note 15, at 41 (discussing dueling as an affirmation of self-control).

64. *See* HUEBNER, SOUTHERN JUDICIAL TRADITION at 63–64 (describing how Tennessee's constitution allowed the legislature to elect members of the state's supreme court and replace the unpopular Catron).

65. *Id.* at 64–65.

II. SUPREME COURT JUSTICE JOHN CATRON

Catron joined a Court on which he was largely overshadowed by his colleagues, yet he was not necessarily outclassed. He was a competent judge, although he, on average, wrote fewer opinions than the rest of his colleagues.[66] Part of that overshadowing came about as a consequence not only of Catron's tendency to specialize in common law matters, but also because the newly appointed Chief Justice Taney, who had a jurisprudential vision that was very similar to Catron's, tended to take the lead in constitutional cases. Thus, Catron had little need to stake out his own ground in those matters. He also showed little inclination to align himself with the Court's regular dissenters. He did not share the nationalist sentiments of Justice Joseph Story; the nationalism, moralism, and concern for individual rights expressed by Justice John McLean; or even—except for a brief period in the 1850s—the rigid states' rights ideology of Justice Peter V. Daniel.[67] Catron thus fell into the Court's mainstream, and his published opinions underscore his role as a common law specialist and his commitment to the Taney Court's Jacksonian jurisprudence.

A. The Nature of Catron's Work

For the most part, Catron's Supreme Court opinions attracted little attention from outside observers. He generally spoke for the Court in property disputes that interested few people beyond the litigants involved. A significant exception to this trend occurred in 1852 when Catron issued an opinion in *Gaines v. Relf*,[68] a case that formed part of Myra Clark Gaines's long-running effort to claim a substantial inheritance from the estate of her father, Daniel Clark.[69] Speaking for a divided Court, Catron ruled that Gaines held no claim to the estate in question because she was the issue of a bigamous marriage. Gaines's mother already was married to another man when she married Clark.[70] Because the case's details were often salacious (Catron expressed regrets that the Court could not rule "without

66. *See* HUEBNER, TANEY COURT at 96 tbl. 2.2 (indicating that other than Justice Wayne, Justice Catron averaged the fewest number of opinions per term on the Taney Court with only 7.5).

67. *See* ALLEN, *supra* note 15, at 30–35 (discussing the varied opinions of the Taney Court's internal critics).

68. 53 U.S. (12 How.) 472 (1852).

69. *See generally* ALEXANDER, *supra* note 17 (providing a full, scholarly treatment of the whole affair); *The Romance of the Great Gaines Case: A Life-Time Lawsuit*, 12 PUTNAM'S MAG. 201 (1868) (providing a brief account of the dispute).

70. *Gaines*, 53 U.S. at 539.

making exposures that would most willingly have been avoided"[71]), the *Gaines* case attracted a great deal of attention.[72] Aside from this interest, however, *Gaines* differed little from the types of opinions Catron wrote during his tenure on the Court.

His opinions typically exhibited little conceptual ambition and involved careful, detailed reviews of the litigants' claims. In *Gaines*, for example, Catron painstakingly examined the daughter's claim that her father's previous marriage had been void at the time of the second marriage. The Justice dismissed witnesses as incompetent[73] and evidence as hearsay.[74] He also concluded that Gaines's mother's decision to sue her previous husband for bigamy in 1806 constituted telling evidence that she was still married in 1802 or 1803 when she purportedly wed Clark.[75]

Catron had used a similar approach years before in *Bank of the United States v. Lee*,[76] in which the Court considered whether Elizabeth Lee, the wife of Richard Bland Lee, was liable for a debt that her husband had incurred before his death. In 1809, Lee gave his wife a piece of land in exchange for her dower lands,[77] although Lee continued to represent himself as the owner and even used the land as collateral for a debt incurred in 1816.[78] Catron, speaking for the Court, examined whether the 1809 deed was fraudulent,[79] whether the wife had knowledge of the 1816 deed of trust,[80] and whether her silence about her husband's use of her land proved that she did not own it.[81] He answered each in the negative and upheld her claim to the land.

Decisions like *Gaines* and *Lee* constituted a significant portion of the Supreme Court's workload, and Catron's approach did little to make him stand out among his colleagues. Nevertheless, one aspect of his work in such cases deserves comment: his common law and equity rulings usually involved claims arising in the Old Southwest, an area

71. *Id.*

72. *See, e.g.*, *Romance of the Great Gaines Case*, *supra* note 69; *Summary*, N.Y. EVANGELIST, Mar. 11, 1852, at 43; *Washington Correspondence*, N.Y. EVANGELIST, Feb. 12, 1852, at 27; Letter from Benjamin Robbins Curtis to George Ticknor Curtis (Feb. 29, 1852) (on file with author) (discussing the *Gaines* case).

73. *Gaines*, 53 U.S. at 539.

74. *Id.* at 533.

75. *Id.* at 512.

76. 38 U.S. (13 Pet.) 107 (1839).

77. *Id.* at 113.

78. *Id.* at 111.

79. *Id.* at 116 (finding that the deed was not fraudulent).

80. *Id.* at 118 (arguing that she may have known of the deed, but noting that there was no proof that she did).

81. *Id.* at 119–22 (finding that the wife's silence did not render her responsible).

characterized by rapid squatter settlement combined with large land grants that often were issued under French or Spanish law. Catron's years of experience on the Tennessee Supreme Court left him well-suited for these types of cases.[82] When it needed to determine who had a greater right to a piece of land granted by France or Spain, the Court often turned to Catron. In 1850, for example, Catron examined two overlapping Spanish land grants in southern Louisiana.[83] The first provided an amount of property large enough to accommodate a colony of 500 wheat farmers in the marshy lands of the area. The second, relatively more recent, grant secured a location suitable for a flour mill and was located within the boundaries of the first grant.[84] After examining the claims, Catron ruled that the second grant—which had precise terms that the grantee met—constituted a true grant,[85] while the earlier one, for a variety of reasons, never conveyed any title to the land in question.[86]

Much of Catron's work on the Court required him to handle these types of cases. Consequently, Catron developed a commanding knowledge of the law of Spanish grants, and he became adept at determining whether a grantee had met the requirements conveying title to a particular piece of land.[87] None of these cases, however, amounted to any memorable part of the Taney Court's work, and the Tennessee Justice often labored in obscurity. Yet, in the course of this work, Catron occasionally issued rulings that demonstrated his full embrace of the jurisprudential framework characterizing the Taney Court.

B. Justice Catron and Jacksonian Jurisprudence

During his tenure on the U.S. Supreme Court, Catron had fewer opportunities to articulate his commitment to Jacksonian jurisprudence than he had on the Tennessee Supreme Court. A number of factors explain this development. First, the jurisdictional

82. *See* HUEBNER, SOUTHERN JUDICIAL TRADITION at 53–55 (discussing Catron's decisions involving squatter settlement); *see also* Brown, *supra* note 12, at 23–27 (discussing the Tennessee Supreme Court's handling of real property cases during the period of Catron's tenure).

83. United States v. Cities of Philadelphia & New Orleans, 52 U.S. (11 How.) 609 (1850).

84. *Id.* at 640–47 (quoting the grants in full).

85. *Id.* at 651.

86. *See id.* at 651–53 (discussing the "manifest inconsistency of assuming that both grants were in full property").

87. *See, e.g.*, Villalobos v. United States, 51 U.S. (10 How.) 541, 557 (1850) (rejecting claim based on a Spanish grant because the land was never surveyed); United States v. Wiggins, 39 U.S. (14 Pet.) 334, 351–52 (1840) (rejecting a claim based on a Spanish grant because the requirement that the land be settled and improved for ten years had not been met).

rules governing the federal courts limited the types of common law cases that came before the Court. None of the types of cases that provided Catron with a chance to moralize on the Tennessee Supreme Court—such as those involving dueling[88]—ever came before him on the federal bench. Likewise, he had limited opportunities to write opinions in constitutional cases because Justices like Taney, Story, and Curtis tended to dominate the issues involved. Even so, Catron managed to speak out enough to demonstrate that he fell squarely within the Taney Court's jurisprudential mainstream.

There are two dimensions in which the Taney Court worked to facilitate popular sovereignty.[89] In its common law decisions, the Court strove to impose an individuated version of self-rule that centered on forcing people to stand by the obligations they incurred in the market (thus setting the expectation that potential litigants govern their affairs in a manner befitting sovereigns).[90] Most of Catron's common law decisions—focused as they were on questions surrounding the validity of particular land grants—did not perform this function. At one point, however, he did write an opinion forcing a litigant to live with the consequences of accepting an invalid bank note.[91] A bank previously had rejected the note, marking it accordingly, and the note's holder subsequently passed it on to others.[92] Catron ruled that later holders were bound to know what the note's marks meant: "Failing to be thus diligent, they must abide by the misfortune their negligence imposed."[93]

Catron participated more fully, however, in the second dimension of the Court's facilitation of popular sovereignty: the effort to impose a regime of collective self-rule by permitting state legislatures a maximum degree of discretion within the constitutional order.[94] Indeed, Catron had a tendency to emphasize the presence of sharp limits on federal authority. In 1845, Catron, speaking for the Court, refused to strike down a New Orleans city ordinance that barred the display of a corpse within a Catholic church.[95] Plaintiff Bernard Permoli argued that the ordinance violated the religious

88. *See supra* text accompanying notes 58–63.

89. *See* ALLEN, *supra* note 15, at 9–67 (discussing the Taney Court's attempts to facilitate popular sovereignty).

90. *See id.* at 37–45.

91. *See* Fowler v. Brantly, 39 U.S. (14 Pet.) 319, 320 (1840) (noting that customary usage of such a note made it likely the note holder knew and understood its reduced value).

92. *Id.*

93. *Id.* at 321.

94. ALLEN, *supra* note 15, at 15–30.

95. Permoli v. City of New Orleans, 44 U.S. (3 How.) 589, 610 (1845).

liberty guaranteed to him by the First Amendment.[96] Catron quickly dismissed the argument, concluding: "The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states."[97]

Catron made a similar point a few years later in *Mills v. St. Clair County*.[98] The case centered on whether the creation of a road and ferry line under an 1839 Illinois law violated the Obligation of Contracts Clause[99] because the state already had granted an exclusive right to the route to another party.[100] The Tennessee Justice dismissed this argument because the Court found the state's prior legislation governing this ferry line to be ambiguous, and according to prior precedent, any ambiguity went against the grantees in favor of the public.[101] The holder of the prior claim, however, also contended that the state had abused its eminent domain power by taking more land than was necessary for a road and ferry.[102] Although he agreed that abuse of such authority was a matter of concern, Catron retorted that the Court could not respond:

> It is not an invasion and illegal seizure of private property on pretence of exercising the right of eminent domain . . . that gives this [C]ourt jurisdiction; such law, and the acts done under it, are not, "the violation of a contract," in the sense and meaning of the Constitution.[103]

Accordingly, Catron argued that only state courts rightly possessed jurisdiction to handle such issues. Catron maintained that if the Court intervened in this case, "all state laws . . . under whose sanction roads, ferries, and bridges are established, would be subject to our supervision."[104] The end result would be that "a vast mass of municipal powers . . . would be taken from the states, and exercised by the general government, through the instrumentality of this [C]ourt."[105]

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96. *Id.* at 609.

97. *Id.*

98. 49 U.S. (8 How.) 569 (1850).

99. U.S. CONST. art. I, § 10.

100. *Mills*, 49 U.S. at 569–74.

101. *Id.* at 581–83; *see also* Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. (11 Pet.) 420, 544 (1837) (setting out the rule later applied in *Mills*).

102. *Mills*, 49 U.S. at 583–84.

103. *Id.* at 585.

104. *Id.*

105. *Id.* at 585–86.

Catron's argument here drew upon one of the most significant aspects of the Taney Court's identity: the insistence that the Supreme Court not usurp the policymaking roles of other actors within the political system.[106] Catron's opinion in *United States v. Boisdoré*[107] illustrates the point. In that case, the Court denied the validity of a title resting on a Spanish land grant because the terms of the grant had not been fulfilled and the grant's boundaries had been poorly surveyed.[108] The first point is of little relevance here,[109] but Catron's comments on the second point proved revealing. If the survey did not effectively mark the boundaries of a particular grant, the Court could not recognize a complete title. "Our action is judicial,"[110] Catron wrote. "We have no authority to exercise political jurisdiction and to grant, as the governors of Spain had, and as Congress has."[111] If the Court did otherwise, he said, then it would be exercising the granting power and transforming by its decree public land into private holdings.[112] "[O]urs would be an exercise of political jurisdiction, and not a judicial decree,"[113] and Catron refused to take on that role.

During that same year, Catron took a similar approach when he upheld a conviction of a man who had cut timber on federal land in violation of a congressional statute reserving certain trees for naval use.[114] Although the statute's title limited the penalty to persons taking timber reserved for naval use,[115] the enabling clause employed more general language.[116] Catron concluded that the removal of any

106. *See* ALLEN, *supra* note 15, at 15–19 (discussing the Taney Court's reticence to openly formulate policy).

107. 52 U.S. (11 How.) 63 (1850).

108. *Id.* at 63.

109. Indeed, this case closely resembled the numerous other cases dealing with Spanish land grants that Catron heard during his tenure on the Court. *See supra* text accompanying notes 83–87.

110. *Boisdoré*, 52 U.S. at 93.

111. *Id.*

112. *Id.*

113. *Id.*

114. United States v. Briggs, 50 U.S. (9 How.) 351 (1850).

115. Act of Mar. 2, 1831, ch. 66, § 1, 4 Stat. 472, 472 ("An Act to provide for the punishment of offenses in cutting, destroying, or removing live oak and other timber or trees reserved for naval purposes.").

116. The relevant clause read:

> If any person or persons shall cut . . . or cause or procure to be removed . . . any live oak or red cedar trees, or other timber, from any other lands of the United States . . . with intent to export, dispose of, use, or employ the same in any manner whatsoever, other than for the use of the navy of the United States; every such person or persons so offending, on conviction thereof . . . shall . . . pay a fine not less than triple the value of the tree or trees or timber

timber constituted a punishable offense.[117] In much the same way as he did in *Boisdoré*, Catron would not substitute the Court's judgment for that of Congress.

Like Catron's common law rulings, none of these rulings particularly stood out. His ruling in *Mills* did little more than apply a doctrine the Court already had established, and his opinion broke no new ground. His opinions in *Boisdoré* and *Briggs* appeared in cases with very little impact. Even his ruling on the First Amendment merely restated a rule set out previously by the Marshall Court.[118] What these rulings demonstrated, however, was Catron's continuing embrace of the Taney Court's larger jurisprudential framework, and this acquiescence by Catron and those colleagues that shared his inclinations exerted a decisive influence on the Taney Court's jurisprudence.

III. JUSTICE CATRON, DISSENTING AND CONCURRING

Catron's willingness to accommodate himself to the Taney Court's jurisprudential vision did not mean that he always agreed with his colleagues. Catron held his own views on particular issues, and he was not afraid to speak his mind. Indeed, Catron dissented on average about twice as often as Chief Justice Taney, although not quite as frequently as Justice McLean and not nearly as much as Justices Daniel or Campbell.[119] Yet, even in those cases, Catron rarely stood out. Two reasons explain this result. First, Catron often offered concurring or dissenting opinions on highly technical issues that offered little challenge to the Court's general framework. As a consequence, his separate opinions fail to be memorable. Second, Catron often put forth his most forceful dissenting and concurring

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> so cut, destroyed, or removed, and shall be imprisoned not exceeding twelve months.

Id.

117. In Catron's words:

> The caption of the act would indicate that timber reserved for naval purposes was meant to be protected by this mode, and none other. But the enacting clause is general, and not restricted to live-oak or red-cedar, nor to timber specially reserved for naval purposes; and therefore cutting and using oak and hickory trees is indictable; and so the cutting and using of any other description of timber trees from the public lands would be equally indictable.

Briggs, 50 U.S. at 355; *see also* ALLEN, *supra* note 15, at 16 (discussing *Briggs* in the context of Taney Court jurisprudence).

118. Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243, 250–51 (1833) (holding that the Constitution's Fifth Amendment prohibition against government taking of property without compensation does not apply to state legislation).

119. HUEBNER, TANEY COURT at 68.

opinions—in which he aired serious differences with his colleagues—when the Court fragmented deeply and produced numerous opinions. During these occasions, his voice often became lost in the cacophony. Catron's contributions to decisions such as *Swift v. Tyson*,[120] *The Passenger Cases*,[121] *Ohio Life Insurance and Trust Co. v. Debolt*,[122] and *Dred Scott v. Sandford*[123] illustrate this aspect of his work.

A good example of Catron's break with the Court on a highly technical matter, which in no way challenged the Court's larger jurisprudential outlook, occurred in his concurrence in *Swift v. Tyson*.[124] In *Swift*, the Court, speaking through Justice Joseph Story, issued two principal rulings. The first was that a preexisting debt constituted valid consideration to make one a bona fide holder of a negotiable instrument.[125] When Story issued this ruling, this question was by no means settled among American courts.[126] But this part of the opinion paled in long-term importance next to *Swift*'s second ruling: state judicial decisions did not constitute law within the meaning of Section 34 of the Judiciary Act,[127] and the federal courts therefore were free to shape their own commercial common law.[128] Commentators long have found this case extremely puzzling because its nationalistic overtones seemingly ran contrary to the general drift of Taney Court jurisprudence,[129] and the *Swift* doctrine ultimately covered a sweeping array of legal questions.[130]

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120. 41 U.S. (16 Pet.) 1 (1842).

121. 48 U.S. (7 How.) 283 (1849).

122. 57 U.S. (16 How.) 416 (1853).

123. 60 U.S. (19 How.) 393 (1857).

124. 41 U.S. at 18–23.

125. *Id.* at 19–20.

126. *See* ALLEN, *supra* note 15, at 55 (discussing the division in the New York courts).

127. Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73, 92 ("[T]he laws of the several states . . . shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.").

128. *Swift*, 41 U.S. at 18–19 (arguing that judicial decisions constitute merely evidence of law, not the law itself).

129. *See, e.g.*, ALLEN, *supra* note 15, at 52–67 (explaining *Swift* as an ideological fulcrum in Taney Court jurisprudence); TONY A. FREYER, HARMONY AND DISSONANCE: THE *SWIFT* AND *ERIE* CASES IN AMERICAN FEDERALISM 4–17 (1981) (explaining *Swift* in the context of antebellum business practices); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1790–1860, at 245–52 (1977) (explaining *Swift* as part of a judicial effort to impose a capitalist legal order on the United States); R. Randall Bridwell, *Theme v. Reality in American Legal History: A Commentary on Horwitz,* The Transformation of American Law, 1790–1860 *and the Common Law in America*, 53 IND. L. J. 449, 473 (1978) (explaining *Swift* as a product of antebellum common law assumptions); Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26 (1952), 101 U. PA. L. REV. 792 (1953) (explaining *Swift* as a product of antebellum international-law assumptions); William LaPiana, Swift v. Tyson *and the Brooding Omnipresence in the Sky: An Investigation of the Idea of Law in Antebellum*

Yet only Catron issued a separate opinion in the case, and he did so on a very narrow point. Justice Story had argued in the course of his opinion that allowing negotiable instruments to be used to settle debts was fundamental to the banking industry.[131] Justice Story offered a question for those who advocated a contrary position:

> What . . . would become of that large class of cases, where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity? Probably more than one-half of all bank transactions in our country . . . are of this nature.[132]

Although Catron agreed generally with the rule Justice Story invoked, he could not accept this part of the opinion.[133] State courts were divided on the issue, and since the question had not been part of *Swift*'s record, they probably would not follow Justice Story's opinion. Catron thus thought his brethren should wait until a proper case came before the Court to pronounce such a rule—at which point "the decision of it either way . . . probably, would, and I think ought to settle it."[134] Catron's argument exerted little influence with his colleagues, and it has not captured the attention of scholars. But the Tennessee Justice's break from the Court in *Swift* revealed a pattern in his work. Catron regularly challenged his colleagues on numerous issues—property cases,[135] equity,[136] jurisdiction,[137] contract,[138]

America, 20 SUFFOLK U. L. REV. 771, 830–32 (1986) (explaining *Swift* as the product of antebellum legal assumptions); Note, Swift v. Tyson *Exhumed*, 79 YALE L.J. 284, 296–97 (1969) (explaining *Swift* as judicial response to the movement to codify common law that still attempted to avoid conflict between the state and federal judicial systems).

130. TONY A. FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY 110–12, 119 n.60 (1979) (arguing that *Swift* covered about twenty-six areas of law at the time it was overturned).

131. *Swift*, 41 U.S. at 18–20.

132. *Id.* at 20.

133. *Id.* at 23 (Catron, J., concurring in the judgment).

134. *Id.*

135. *See, e.g.*, Gaines v. Hennen, 65 U.S. (24 How.) 553, 617 (1860) (Catron, J., dissenting) (breaking with the Court over a point of Spanish divorce law); Pollard's Heirs v. Kibbe, 39 U.S. (14 Pet.) 353, 427–29 (1840) (Catron, J., dissenting) (breaking with the Court over who could cede property in Mobile at this time); Lattimer's Lessee v. Poteet, 39 U.S. (14 Pet.) 4, 17–18 (1840) (Catron, J., concurring in part, dissenting in part) (agreeing with his brethren that the lower court had given erroneous instructions, but disagreeing where the Treaties of Tellico and Holston fixed the line of settlement); Strother v. Lucas, 37 U.S. (12 Pet.) 410, 462–70 (1838) (Catron, J., concurring in part, dissenting in part) (concurring, but rejecting the principles on which the Court based a Spanish land grant case).

136. *See, e.g.*, Rhode Island v. Massachusetts, 39 U.S. (14 Pet.) 210, 279–81 (1840) (Catron, J., dissenting) (citing numerous objections to the Court's handling of equity rules); Jenkins v. Pye, 37 U.S. (12 Pet.) 241, 255–63 (1838) (Catron, J., concurring) (setting out what he deemed to be a proper understanding of equity rules).

137. *See, e.g.*, Moore v. Brown, 52 U.S. (11 How.) 414, 430–36 (1850) (Catron, J., dissenting) (stating his belief that the parties wrongfully took advantage of jurisdictional rules to get before

procedure,[139] patents,[140] and statutory interpretation[141]—yet he generally did so on such narrow or technical grounds that his opinions rarely stood out as memorable.

Catron's inability to distinguish himself from his colleagues also was manifested in his constitutional opinions—except in those decisions in which the Tennessee Justice's obscurity was more a consequence of disappearing in a sea of voices rather than one of narrowness and technicality. Generally, one of Catron's primary constitutional concerns appeared buried in decisions featuring multiple opinions. Catron took very seriously the principle that every state was equal to the others and that each possessed the same rights and authority. On the Tennessee Supreme Court, he had drawn on this principle in *State v. Foreman*[142] to justify a state's removal policy on the ground that other states were not required to endure self-governing Indian nations within their boundaries.[143] He also had invoked the principle in *Fisher's Negroes v. Dabbs*,[144] in which he upheld an act of manumission on the ground that the newly freed subjects settle outside the United States. Catron took this position in part because the principle of state equality suggested that no state possessed a right to force upon another a population that it did not want.[145]

On the U.S. Supreme Court, Catron pronounced this position in *Permoli v. New Orleans*, in which he rejected federal protection for religious practices discouraged by state action.[146] That case implicated more than just the First Amendment;[147] the plaintiff also had argued

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the Court); N.J. Steam Navigation Co. v. Merchants' Bank of Boston, 47 U.S. (6 How.) 344, 393–95 (1848) (Catron, J., concurring) (agreeing that this case fell into federal admiralty jurisdiction but arguing that the issue was one of tort rather than contract); Toland v. Sprague, 37 U.S. (12 Pet.) 300, 338 (1838) (Catron, J., expressing no opinion) (addressing whether circuit courts had jurisdiction to issue foreign attachments).

138. *See, e.g.*, Bradley v. Wash., Alexandria, & Georgetown Steam Packet Co., 38 U.S. (13 Pet.) 89, 104–06 (1839) (Catron, J., dissenting) (disagreeing with the Court over the acceptability of an oral modification to a written contract).

139. *See, e.g.*, Clements v. Berry, 52 U.S. (11 How.) 398, 412–13 (1850) (Catron, J., dissenting) (addressing the point at which a judgment attaches according to Tennessee law).

140. *See, e.g.*, Hogg v. Emerson, 52 U.S (11 How.) 587, 608–09 (1850) (Catron, J., dissenting) (speaking for Justices Taney, Daniel, and Grier, rejecting the Court's holding that a patent could cover more than one invention).

141. *See, e.g.*, Nelson v. Carland, 42 U.S. (1 How.) 265, 266–77 (1843) (Catron, J., dissenting) (finding that the Court misinterpreted a badly drawn statute).

142. 16 Tenn. 256 (1835).

143. *Id.* at 316–19.

144. 14 Tenn. 119, 161 (1834).

145. *Id.* at 157–59.

146. 44 U.S. (3 How.) 589, 609–10 (1845).

147. *See supra* text accompanying notes 95–97.

that the religious protections contained in the Northwest Ordinance[148] (which, with the exception of the restriction against slavery,[149] had been extended to every territory south of the Ohio River[150]) barred religious discrimination. Catron, however, made short work of that argument. Whatever force the Ordinance possessed, such force ended when Louisiana became a state and entered the union on an equal footing with its peers, Catron wrote.[151] Congress no longer could place any requirements on Louisiana beyond those contained in the Constitution itself.[152] *Permoli* attracted little notice, but Catron made the argument again a few years later in *Strader v. Graham*.[153] This time, Catron rejected the argument that the Ordinance's antislavery provisions had freed a group of enslaved musicians whose master had permitted them to travel into Ohio and other free states.[154] Just as he had done in *Permoli*, Catron insisted that the Ordinance lost any force it had when a territory that had developed under its governance joined the Union.[155] His argument, however, was overshadowed by that of Chief Justice Taney,[156] who expressed an argument very similar to Catron's, and by Justice McLean,[157] who took pains to defend the Ordinance's antislavery provisions. In general, only Taney's (and sometimes McLean's) contributions to *Strader* have received any notice.[158]

Catron's tendency to get drowned out among the voices of his colleagues emerged vividly in *The Passenger Cases*, in which he aired his state equality argument.[159] In that decision, a Court so deeply

148. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52 n.(a), art. I.

149. *Id.* at 53 n.(a), art. VI ("[T]here shall be neither slavery nor involuntary servitude in the . . . territory."); *see also* Act of Apr. 2, 1790, ch. 6, 1 Stat. 106, 108 (allowing for North Carolina's ceding land to the United States "*provided always*, That no regulations made or to be made by Congress, shall tend to emancipate slaves").

150. Act of May 26, 1790, ch. 14, 1 Stat. 123 (organizing the Southwest Territory along the terms specified by the North Carolina cession).

151. *Permoli*, 44 U.S. at 610.

152. *Id.*

153. 51 U.S. (10 How.) 82, 98 (1850) (Catron, J., concurring in part and concurring in the judgment).

154. *Id.* at 98–99.

155. *Id.*

156. *Id.* at 94–97 (citing *Permoli*).

157. *Id.* at 97.

158. *See* ALLEN, *supra* note 15, at 92–93 (discussing *Strader* without mention of Justice Catron); *see also* FEHRENBACHER, *supra* note 14, at 234, 260–62; PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 271–74 (1981) (same); Wiececk, *supra* note 18, at 34, 53–54 (1978) (mentioning only Catron's opinion in *Permoli* during discussion of *Strader*).

159. 48 U.S. (7 How.) 283 (1849).

fragmented that no single Justice could speak for it ruled that states held no constitutional authority to levy a tax on healthy immigrants before they could disembark from a port within the state's jurisdiction.[160] A group of four Justices dissented (in three separate opinions) and argued that this power was incident to state police power and constituted part of the states' authority over their internal populations.[161] Catron sided with the majority and ruled that the anti-immigration laws simply constituted a tax on foreign commerce, and therefore were unconstitutional.[162] In the course of that argument, however, Catron suggested that such anti-immigrant laws treated other states unfairly. "Some states may be more desirous than others that immigrants from Europe should come and settle themselves within their limits; and in this respect no one State can rightfully claim the power of thwarting by its own authority the established policy of all the States united."[163] Just as Catron's vision of state equality demanded the colonization of newly freed blacks,[164] his vision in this instance demanded a national immigration policy, one that "opened the door widely and invited the subjects of other countries to . . . come to the United States, and seek here new homes for themselves and their families."[165] Whether individual states agreed with that policy, Catron argued, was of no concern to the Court.[166] But this argument, like most of his arguments, was lost in the flurry of opinions produced by his colleagues.

Many of Catron's other opinions suffered a similar fate. His argument in *Ohio Life Insurance & Trust Co. v. Debolt*[167] provides a good example. *Debolt* was one of three cases involving an attempt by Ohio to abrogate favorable taxation provisions it had inserted into the charters of banking corporations in an effort to attract businesses to the state.[168] This effort had run up against the Constitution's Obligation of Contracts Clause[169] as interpreted by the Court in

160. *Id.* at 572–73.

161. Chief Justice Taney dissented along with Justices Daniel, Nelson, and Woodbury. *Id.* at 464–572; *see* ALLEN, *supra* note 15, at 88–89 (discussing the arguments of those Justices).

162. ALLEN, *supra* note 15, at 88–89. Catron also believed that Congress's passage of naturalization legislation trumped any concurrent authority the states may have held. *Id.* at 89–90.

163. *Passenger Cases*, 48 U.S. at 442–43.

164. *See supra* text accompanying notes 144–145.

165. *Passenger Cases*, 48 U.S. at 442.

166. *Id.* at 442–43.

167. 57 U.S. (16 How.) 416 (1853).

168. ALLEN, *supra* note 15, at 110–11.

169. U.S. CONST. art. I, § 10.

Dartmouth College v. Woodward[170] and as qualified by *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*.[171] This doctrine held that corporate charters could not be altered by state legislatures unless the charter in question contained explicit language permitting such alterations.[172] Any ambiguity in these documents, however, would be construed against the holders of the charter and in favor of the public.[173] The Ohio banking charters contained no ambiguity, and the Court ruled in the same Term as *Debolt* that a statute revising the tax policy was unconstitutional.[174] (A few years later, the Court would rule that Ohio could not revise its policy through the creation of a new constitution.[175]) Although the Court ruled in *Debolt* that the document in question was not a constitutionally protected charter, Catron chose this case to announce his rejection of *Dartmouth*.[176] He found the qualification in *Charles River Bridge* to be "illusory and nearly useless" because any good lawyer could find an argument to bring a corporate charter under the protection of the Obligation of Contracts provision.[177] Catron's concurrence however, proved hard to digest, in part because he spread his full argument across the Ohio Bank decisions, and because he allowed Justices Daniel and Campbell to speak for him at times.[178] Both factors contributed to his losing himself in the crowd of Justices with whom he worked.

Catron's tendency to speak up only when his colleagues did and his penchant for technicality converged in the *Dred Scott* case, in which he expressed significant disagreements with the Court's majority opinion,[179] but he did so in a manner that rendered them difficult to digest. Catron agreed with the majority of his colleagues that Dred Scott, an enslaved man who had been taken into free territory covered by the antislavery provision of the Missouri Compromise, was still a slave and that the antislavery provision was

170. 17 U.S. (4 Wheat.) 518 (1819).

171. 36 U.S. (11 Pet.) 420 (1837).

172. ALLEN, *supra* note 15, at 106–07.

173. I have discussed *Dartmouth* and *Charles River Bridge* extensively elsewhere. ALLEN, *supra* note 15, at 99–107.

174. Piqua Branch of the State Bank of Ohio v. Knoop, 57 U.S. (16 How.) 369, 392 (1853).

175. Dodge v. Woolsey, 59 U.S. (18 How.) 331, 360 (1855).

176. Ohio Life Ins. & Trust Co. v. Debolt, 57 U.S. (16 How.) 416, 441–43 (1853) (Catron, J., concurring in the judgment).

177. *Id.* at 442.

178. *See* ALLEN, *supra* note 15, at 110–14 (arguing that the Ohio bank cases are so similar that one best approaches them as a single case).

179. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 518–29 (1857) (Catron, J., concurring in the judgment).

unconstitutional.[180] But his agreement ended there, and he rejected both Chief Justice Taney's handling of questions related to Dred Scott's citizenship and the Chief Justice's interpretation of congressional power over the territories.[181] Taney opened his ruling with an elaborate and unabashedly racist argument, contending that the federal courts had no jurisdiction over the case because no African-American person, free or slave, could be a citizen of the United States, and therefore he had no standing to maintain his suit.[182] Catron did not believe this issue was properly before the Court.[183] Scott's purported owner, John Sandford, had raised the issue of Scott's citizenship in the court below; the judge ruled that Scott had standing, and Sandford did not challenge the case's procession to an examination of the merits.[184] By proceeding, Catron concluded, Sandford waived his objections to jurisdiction.[185] Catron staked out an unassailable position for a common law court, but the pleading rules for the federal courts, as both Taney and the dissenting Justice Curtis argued, were different.[186] Yet Catron may have had another reason to dodge the issue. His opinion in *Fisher's Negroes*, which had held that manumitted persons must leave the country,[187] strongly implied that an act of emancipation in effect created a citizen (and perhaps conferred constitutional protection). If he still adhered to that position, then his stance on the jurisdictional question offered an effective way to evade its consequences.

Catron also sharply rejected Taney's interpretation of Congress's power over the federal territories.[188] The Chief Justice essentially set aside the Court's previous holding that the Constitution's Needful Rules Clause[189] gave Congress a general authority to govern the federal territories.[190] He considered such

180. *Id.* at 523, 527–29. This is a simplified version of the facts involved in *Dred Scott*. For a fuller version, see ALLEN, *supra* note 15, at 140–43, and the sources cited therein. None of the actual events, however, were in any way relevant to Catron's argument.

181. *Dred Scott*, 60 U.S. at 527–29 (Catron, J., concurring in the judgment).

182. *Id.* at 403–27.

183. *Id.* at 518–19 (Catron, J., concurring in the judgment).

184. *Id.*

185. *Id.*

186. *Id.* at 401–03; *id.* at 564–66 (Curtis, J., dissenting). There were numerous barriers for Catron's arguments. *See* ALLEN, *supra* note 15, at 150–51 (discussing the intricacies of antebellum federal pleading rules).

187. Fisher's Negroes v. Dabbs, 14 Tenn. 119, 126 (1834).

188. *Dred Scott*, 60 U.S. at 522–29 (Catron, J., concurring in the judgment).

189. U.S. CONST. art. IV, § 3, cl. 2.

190. *Dred Scott*, 60 U.S. at 431–52.

governing authority an incident to the power to create new states.[191] He then insisted that the Constitution and Bill of Rights place stark limits on the exercise of that authority and ruled that the Missouri Compromise's antislavery provision violated the Fifth Amendment's Due Process Clause and was void.[192] Catron considered Taney's argument to be overreaching—one that came closer to a statement of policy than a judicial decision.[193] He believed, arguably incorrectly, that the Court had accepted the Needful Rules Clause as the basis of territorial power in the early 1850s.[194] Catron, who had sentenced convicted criminals to death while riding circuit in the territories, considered the implications of Taney's argument to be chilling.[195] If the Chief Justice was correct, Catron may have been acting without authority, and the executions he ordered would not have been legal actions.[196]

Catron responded by crafting an opinion that struck down the Missouri Compromise without requiring a complete revision of federal territorial policy.[197] He did so by looking to the 1803 treaty with France that transferred the Louisiana Purchase territory to the United States.[198] That document guaranteed federal protection of the Louisiana inhabitants' liberty, property rights, and religious freedom.[199] And, because Louisiana possessed a plantation economy, those property rights included extensive slaveholdings.[200] Ending slavery within any portion of the territory, Catron argued, exceeded Congress's authority: it could just as likely end slavery in New Orleans as in the areas north of the 36°-30' line.[201] None of Catron's

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191. *Id.*

192. *Id.*

193. *Id.* at 522–29 (Catron, J., concurring in the judgment).

194. *Id.* at 522–23 (citing Cross v. Harrison, 57 U.S. (16 How.) 164 (1853)); *see also* ALLEN, *supra* note 15, 195–96 (explaining Catron's position more fully).

195. ALLEN, *supra* note 15, 195–96.

196. *See Dred Scott*, 60 U.S. at 522–23 (Catron, J., concurring in the judgment):

> It is due to myself to say, that it is asking much of a judge, who has for nearly twenty years been exercising jurisdiction, from the western Missouri line to the Rocky Mountains, and, on this understanding of the Constitution, inflicting the extreme penalty of death for crimes committed where the direct legislation of Congress was the only rule, to agree that he had been all the while acting in mistake, and as an usurper.

197. *Id.* at 522–29.

198. *Id.* at 524.

199. *Id.*

200. *Id.* at 524–25.

201. *Id.* at 525.

colleagues seemed to find this argument persuasive, although only Justices Curtis and McLean offered a refutation.[202]

Catron's positions in *Dred Scott*, however, remained true to the jurisprudential assumptions to which he had adhered throughout his career. His argument seemed less a declaration of policy than did Taney's, and it probably permitted Catron to convince himself that he was not really making law: he simply was applying the Constitution. Moreover, as he did in his ruling in *Foreman*,[203] Catron emphasized that the federal government could not employ its power to create treaties in a manner that allowed it to evade its constitutional limits.[204] Congress, therefore, had no authority to prohibit the expansion of slavery into the federal territories.[205]

Yet, in these dissenting and concurring opinions, like those he wrote when he spoke for the majority, Catron still failed to distinguish himself from the rest of his colleagues on the Court. His dissent in *Debolt*, for example, was deeply entangled with the dissents of Justices Daniel and Campbell in related cases, and the other two Justices effectively overshadowed him. In *Dred Scott*, although he likewise expressed considerable differences with Chief Justice Taney, Catron nevertheless agreed on the general outcome, and his opinion became intermixed with those of the other Justices who supported the outcome and wrote their own opinions. And his concurrence in *Swift v. Tyson* was so narrow as to be hardly distinguishable from the argument rendered by Justice Story. Such a record indeed may explain why former Attorney General George H. Williams could hardly recollect the Justice from Tennessee.[206]

IV. CONCLUSION

Perhaps this obscurity embodies Justice Catron's true legacy to the Court. His significance by no means emerged from anything resembling judicial greatness, even if we could establish a baseline by which to measure such a status. G. Edward White cautions against such projects, stressing that the construction of criteria that allow for the comparison of Justices across time may well be impossible.[207] Almost all of the Justices to serve on the Court, he argues, suffer

202. ALLEN, *supra* note 15, at 196 (discussing criticism of Catron's treaty argument).

203. State v. Foreman, 16 Tenn. 256, 335–36 (1835).

204. *Dred Scott*, 60 U.S. at 527 (Catron, J., concurring in the judgment).

205. *Id.* at 527–29.

206. Williams, *supra* note 1, at 296.

207. G. Edward White, *Neglected Justices: Discounting for History*, 62 VAND. L. REV. 319 (2009).

scholarly neglect as they become less familiar to later generations.[208] This mass of neglected judicial figures, however, probably shaped the Court decisively by providing the backdrop against which a handful of Justices—John Marshall, Oliver Wendell Holmes, Jr., and Benjamin Cardozo—stand out. The Taney Court had no members who proved to be so historically prominent, but it did possess a number of figures who overshadowed their colleagues. And Catron's rather quiet tenure may have helped make that overshadowing possible.

One of the Taney Court's most interesting features stemmed from the presence of three Justices who, for different reasons, consistently expressed disagreements with the set of Jacksonian jurisprudential assumptions that defined the Court's approach to most legal questions. Justice Story, who spent most of his tenure serving with John Marshall, recoiled from the increased deference accorded by the Court to state legislatures.[209] Justice McLean objected to the Court's subordination of individual rights, including those of African-Americans, to the Court's proslavery conception of federalism. Justice Daniel, in contrast, thought the Court to be insufficiently protective of states' rights.[210] At most points of his tenure, however, Catron, along with his colleagues, rejected all of those positions. He generally favored giving states relatively free rein in matters of policy, a position that his rulings in *Permoli* and *Mills v. St. Clair County* underscored. Both of those cases, moreover, showed a marked insensitivity to individual rights. And although he flirted with Justice Daniel's positions in the early to mid-1850s, Catron ultimately rejected those as well, even to the point of retaining his seat on the Court after his home state of Tennessee seceded from the Union.[211]

In taking these positions, Catron displayed commitments shared by a majority of his colleagues and most notably by Chief Justice Taney, who was the fourth Justice to stand out during Catron's tenure. Taney, however, did not distinguish himself because he rejected the assumptions of Jacksonian jurisprudence; rather, he did so because he generally embodied them. For students of the Supreme Court, Taney's name largely has become synonymous with a jurisprudence seeking, for the most part, to roll back federal power, promote economic development, and defend slavery, and the Chief Justice's name appeared on many rulings to that effect. But Taney's

208. *Id.*

209. *See* ALLEN, *supra* note 15, at 31–35 (discussing the positions of Justice Story and others on the Taney Court).

210. *Id.*

211. HUEBNER, TANEY COURT at 67.

ability to transform these positions into official judicial rulings depended heavily on the support of Justices like Catron—Justices who had spent much of their careers articulating a set of jurisprudential assumptions quite similar to Taney's, and whose presence on the Court, however unremarkable to later generations of scholars and jurists, Taney could not neglect because their shared assumptions defined the limits of the possible.

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